

## CHAPTER 13

# PROSECUTING OFFENSES ON A MILITARY INSTALLATION

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>1</b>
	A. Physical security is the commander's responsibility. ....	1
	B. Installation commanders must develop, establish, and maintain policies and procedures, tailored to local conditions, to protect the installation, including: .....	1
<b>II.</b>	<b>THE THREE MOST IMPORTANT QUESTIONS.....</b>	<b>1</b>
	A. What routine level of control do I have over the access to, and egress from, my installation? .....	1
	B. What kind of federal prosecution program, if any, does my installation currently have in place? ..	5
	C. What is my installation doing about juvenile crime?.....	8
<b>III.</b>	<b>CONCLUSION.....</b>	<b>8</b>

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## CHAPTER 13

### PROTECTION OF THE MILITARY INSTALLATION

#### I. INTRODUCTION.

- A. Physical security is the commander's responsibility.
- B. Installation commanders must develop, establish, and maintain policies and procedures, tailored to local conditions, to protect the installation, including:
  - 1. determining the **routine degree of control** over access to, and egress from, the installation;
  - 2. **removal of, or denial of access to, persons** who threaten order, security, and discipline on the installation;
  - 3. **designate restricted areas**, if appropriate.

Dep't of Army, Reg. 190-16, Military Police: Physical Security para. 12 (31 May 1991).

#### II. THE THREE MOST IMPORTANT QUESTIONS.

- A. What routine level of control do I have over the access to, and egress from, my installation?
  - 1. Installations generally fall into one of three categories, informally referred to as either "open," "closed," or "mixed" posts; the category to which your installation belongs will determine the ease with which you can apply the following statutes.
  - 2. Trespass Offenses. 18 U.S.C. sec. 1382.
    - a. **Entry for an Unlawful Purpose.**

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(1) Statutory Text.

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, **for any purpose prohibited by law or lawful regulation** . . . [s]hall be fined under this title or imprisoned not more than six months, or both.

- (2) **"For any purpose prohibited by law or lawful regulation"** may include, but is not limited to, the entry itself; however, knowledge by the defendant that the entry was prohibited must be established at trial.

(a) Constructive notice.

May be established by publication of facility access regulation in Federal Register. United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978), cert. denied, 439 U.S. 967 (1978).

(b) Actual Notice.

- (i) Multiple signs, fence around facility, and nature of defense at trial showed actual notice. United States v. Cottier, 759 F.2d 760 (9th Cir. 1985).
- (ii) Conduct of defendant upon entry to fenced, guarded facility showed actual notice. United States v. Hall, 742 F.2d 1153 (9th Cir. 1984).
- (iii) Earlier lawsuits and requests for access to facility and prior statements showed actual notice. United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978), cert. denied, 439 U.S. 967 (1978).
- (iv) One sign, five security guards, and a fence around facility. United States v. Floyd, 477 F.2d 217 (10th Cir. 1973), cert. denied, 414 U.S. 1044 (1973).

- (v) But cf. United States v. Parrilla Bonilla, 648 F.2d 1373 (1st Cir. 1981) (holding evidence not sufficient to establish actual notice).

b. **Unlawful Reentry.**

(1) Statutory Text.

Whoever **reenters or is found within any such reservation**, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof - [s]hall be fined under this title or imprisoned not more than six months, or both.

(2) Reentry or Discovery.

- (a) Must be **knowing**. United States v. Vasarajs, 908 F.2d 443 (9th Cir. 1980) (holding signs on access road to be sufficient to establish notice of entry).

- (b) **Motives** for reentry are generally **irrelevant**. United States v. Albertini, 472 U.S. 695 (1985).

(3) After Removal or Bar.

Trespassers or other individuals who have engaged in misconduct on post are generally given formal written notice, i.e., a bar letter, that they are not to reenter the installation without the written permission of the commander.

(4) By any officer or person in command or charge thereof.

- (a) The installation commander must authorize the bar letter. United States v. Levalley, 957 F.2d 1309 (6th Cir. 1992), cert. denied, 113 S. Ct. 460 (1992).

(b) Individuals excluded have no due process rights, but the commander cannot exercise authority to “bar” in an arbitrary or capricious manner. Serrano Medina v. United States, 709 F.2d 104 (1st Cir. 1983); Tokar v. Hearne, 699 F.2d 753 (5th Cir. 1983), cert. denied, 464 U.S. 844 (1983).

(c) Installation commanders can issue “tailored” bar letters when statutory privileges are involved. Berry v. Bean, 796 F.2d 713 (4th Cir. 1986).

c. **Military, naval, or Coast Guard property** is expansively defined in the caselaw, and may include, by example, areas adjacent to an installation designated as a “security zone” by federal regulation, United States v. Allen, 924 F.2d 29 (2d Cir. 1991), or the driveway leading to the entrance gate at a post. United States v. McCoy, 866 F.2d 826 (6th Cir. 1989).

B. What kind of federal prosecution program, if any, does my installation currently have in place?

1. An individual, military or civilian, who violates federal law within the territorial limitations of the United States can be prosecuted for the offense in federal district court. Dep’t of Army, Reg. 27-10, Legal Services: Military Justice, para. 23-1b (6 September 2002) [hereinafter AR 27-10].
2. While prosecutions in federal district court are the responsibility of the U.S. Department of Justice, most military installations have had appointed one or more Judge Advocates or civilian attorneys as **Special Assistant U.S. Attorneys** (SAUSA) to prosecute crimes in which the military has an interest. AR 27-10, para. 23-4; 28 U.S.C. sec. 543.
3. Military SAUSA will be subject to the primary **supervision** of the **local U.S. Attorney’s office**, and will perform their duties in accordance with the Memorandum of Understanding (MOU) between the U.S. Attorney and the SJA or legal advisor. AR 27-10, para. 23-4c. An example of a typical MOU can be found at Figure 23-3, AR 27-10.

4. SAUSA is **not a police function**, so is not violative of Posse Comitatus Act, 18 U.S.C. §1835; 18 U.S.C. §806(d). See, e.g., United States v. Allred, 867 F. 2d 856 (5th Cir. 1989) (finding no limit on whom the Attorney General may appoint, or what that person may do).



5. Misdemeanors and the U.S. District Court.

- a. Any individual, military or civilian, who commits a misdemeanor or infraction on a military installation can be prosecuted before a Magistrate Judge. AR 27-10, para. 23-5a.
- b. AR 190-29 requires each installation to establish procedures on how and when to refer soldiers for trial by the magistrate judge.
- c. It is generally expected that the magistrate system will be used whenever feasible, particularly for minor offenses of a civil nature, e.g., traffic violations.
- d. If there is no magistrate judge appointed to hear cases at your installation, the command can request the U.S. Attorney to petition the U.S. District Court to appoint one.
- e. The **installation** generally pays for witnesses that appear in proceedings before the magistrate judge.
- f. Trial before a magistrate judge is **voluntary**; a defendant may demand trial before a judge in federal district court.

6. Felony Prosecutions in U.S. District Court.

- a. An increasing number of installations have been granted the authority by the Justice Department to prosecute felony offenses committed by civilians on military installations in federal district court.
- b. Approval of such a program is usually made dependant upon the SJA committing an attorney for up to two years to the U.S. Attorney's Office; inter-office negotiation is sometimes required.
- c. **Authorization** to conduct such a program must be obtained from the **Office of the Judge Advocate General**.

- d. **Witness expenses** in felony prosecutions are often funded out of **DA-level accounts**.

C. What is my installation doing about juvenile crime?

1. The **federal policy** toward juvenile misconduct is **abstention**.
2. Juveniles may, nevertheless, be tried before the magistrate judge for petty offenses committed on the installation; however, the magistrate judge may not impose any period of confinement upon a juvenile.
3. Juveniles who commit class A misdemeanors or felonies on the installation may only be tried in federal district court if one of three conditions is met:
  - a. State **cannot, or will not, assume jurisdiction** over the juvenile;
  - b. State programs are **inadequate**; or
  - c. The charged offense is a **felony or certain drug offenses**, and there is **substantial federal interest** in the case.
4. Unless at least one of these conditions met, then the juvenile **must** be surrendered to state authorities.
5. Time is of the essence when handling juveniles.

- a. **Apprehension.**

When a juvenile is taken into custody, they “shall be taken before a magistrate forthwith.” 18 U.S.C. sec. 5033.

- b. **Trial.**

Juveniles in pre-trial detention generally must be brought to trial within 30 days of the commencement of detention. 18 U.S.C. sec. 5036.

### III. CONCLUSION.